No. 10,690

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CLINTON B. McELHENY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

BRIEF FOR APPELLANT.

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THE COURT HAS JURISDICTION.

The United States of America is plaintiff, the indictment charges criminal offenses, and the judgment and sentence are final. This Court has jurisdiction of this appeal under 28 U.S.C.A. Sec. 225 and Rule III, Rules of Practice and Procedure after Verdict of Guilty.

STATEMENT OF PROCEEDINGS HAD.

Appellant, employed at McClellan Field near Sacramento, California, since June, 1939, and as Assistant

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(Note): The letter "T" in parentheses followed by a number, refers to the page of the printed Transcript of Record.

Superintendent, Air Craft Shops, since October 13, 1942, was charged by indictment returned January 7, 1944 (T. 2) in Count One thereof, with having taken and carried away on or about January 1, 1942, with intent to steal or purloin the same, certain small tools therein described, and in Counts Two, Three, Four, Five and Six, with unlawfully having the same tools in his possession on or about November 24, 1943, with intent to convert the same to his own use and gain.

Appellant was arraigned January 12, 1944, pleaded Not Guilty on all Counts, waived a jury, and was tried to the Court, February 16 and 17, 1944.

The trial Court found him guilty on Count One, not guilty on Counts Two, Three, Four, Five and Six, dismissed them, denied Motion for New Trial and sentenced him to One Year in the County Jail.

Notice of Appeal was timely filed, Bill of Exceptions and Assignment of Errors were lodged with the trial Court March 8, 1944, and the Bill of Exceptions was settled and approved by the trial Court March 17, 1944.

STATEMENT OF THE CASE.

Appellant entered the employ of the U. S. Army Air Corps at Rockwell Field, near San Diego, March 1, 1929 (T. 62), and was transferred to McClellan Field in June, 1939. In transferring, he shipped and brought a lot of tools, some of which were his own, and some belonged to the Air Force.

(T. 64.) Some were charged to him on memorandums (T. 64), in accordance with the method used in these Fields and established by the U. S. Army. Some was expendable material which he had put in a box and had taken to his home when he was promoted to Assistant Superintendent for the reason he had no place to keep them (T. 71).

All these, except expendable material, were charged to him on memorandums issued by the tool room at the Field. He was working fourteen hours a day, had to stay on the job to meet three shifts and could not get his memorandums cleared (T. 71).

He carried tools to and from his work and it never occurred to him he was committing a crime in so doing (T. 72).

Much of the equipment, in fact all save ten pieces, itemized in the indictment could not be identified as property of the United States, yet was admitted in evidence over objections of appellant's counsel, as U. S. Exhibit 12 (T. 62). Some of this equipment was charged to defendant and he had paid the Field for it (T. 81). That may have been wrong, but it was the system established and enforced by the Air Corps.

Some belonged to the defendant personally (T. 77). He had those items in his possession from sixteen to eighteen years (T. 77). The drills and taps were standard tools not marked or identified as property of the United States (T. 46). Similar testimony as to the other tools was ruled out by the trial Court (T. 47).

A box of tools consisting of old type carbon drills, dies, collets, reamers and files admitted in evidence as U. S. Exhibit 12 (T. 62) over objection of appellant's counsel, were without any identifying marks and admitted on the statement of witness Park that he had never seen them on the Field and did not know as a fact, they came from McClellan Field (T. 51). The only identifying evidence or testimony offered by plaintiff was that they were similar to articles at McClellan Field (T. 51). The testimony and evidence as to the other exhibits of tools were the same.

For three days appellant was held in technical custody (T. 45, 85), although it developed at trial he was not actually under arrest. He was made to understand, however, that he was detained.

During this period he was hailed before what he was advised was a court martial proceeding, advised by a Lieutenant Ark that it was a court martial as shown by U. S. Exhibit 10 (T. 55), and also advised by a Captain Pearce (T. 85) who read the Articles of War to appellant. Out of this hybrid proceedings, which plaintiff endeavored to repudiate, a so-called confession (U. S. Exhibit 10) was obtained from appellant.

The second day of this restraint appellant took witness Chandler to appellant's home where the lot of tools set forth in the indictment was pointed out to Chandler. Appellant had, during the August previous, told the Intelligence officers at the Field he had some tools at home (T. 82) and was endeavor-

ing to clean up his memorandums. At no point is this statement denied or even challenged.

On the third day he was "invited" to come to the office of an F. B. I. Agent, Mr. Moehle (T. 57), where another "confession" was obtained (T. 58). This "confession" was admitted in evidence over objection of appellant's counsel as U. S. Exhibit 11 (T. 58), and without the list of articles, was read into the record.

Thereafter appellant was discharged from his employment on November 25, 1943 (T. 63).

Although the "confession" obtained at the pseudo-court martial shows some tools were taken from the Field by appellant on a pass, all testimony and evidence offered by defendant relating to a pass for tools was ruled out by the trial Court (T. 94).

ASSIGNMENTS OF ERROR Nos. 1, 2, 3, 4, 5, 6 AND 7.

The Court erred in admitting U. S. Exhibits Nos. 2, 3, 4, 5, 6, 7 and 8.

We have grouped these seven Assignments for the reason they refer to physical exhibits, the testimony referring to them being identical and came from the same witness.

These exhibits are respectively, 10-inch Wrench, Padlock, Machinist's Scriber, Pliers, Steel Tape, Wrench and Pliers.

No witness identified any of the exhibits as having been at McClellan Field; no witness ever saw them

at the Field, and no witness produced by the government could identify any of them as property of the United States as of January, 1942, or November, 1943, or as of any other time.

They were admitted on the sole ground they were similar to tools at the Field.

They were standard tools such as are used in any machinist's or mechanic's trade, purchasable anywhere, and by their very inherent nature actually are similar to McClellan Field tools exactly as they are similar to standard tools of the same form (T. 47). The padlock bore a number used a long time ago at the Field, but no longer used (T. 49). Other tools bore marks similar to the markings used at the Field (T. 50).

ASSIGNMENT OF ERROR No. 8.

The Court erred in admitting U. S. Exhibit No. 9, a miscellaneous lot of tools (T. 50).

This exhibit consisted of a lot of worn and rusted wrenches, files, and a hodge-podge of odds and ends such as is found around the home shop of any machinist. This lot was without any identifying marks whatever that could fix their place of origin as McClellan Field. They were admitted on the sole ground of similarity (T. 51). The only witness who made any pretense of identifying them stated he never saw them until the morning of the trial (T. 51).

ASSIGNMENT OF ERROR No. 9.

The Court erred in admitting U. S. Exhibit No. 10 (T. 54) over the objections of appellant, as follows:

1. It was hearsay evidence, did not contain all the evidence and statements obtained and made during the session of the Summary Court and was an extra-judicial confession obtained by trick and ruse and without any foundation having been laid for its introduction.

2. Its nature was highly prejudicial to the appellant.

This exhibit consisted of a purported "confession" by appellant taken at McClellan Field November 24, 1943.

The opening paragraph of this statement is ample to damn it as a confession obtained by trick artifice and fraud:

> "I, Clinton B. McElheny, having been duly warned of my rights under the 24th Article of War and knowing that as a civilian employee of the War Department am fully subject to the processes of a military court or tribunal duly authorized to take oaths without any threats, coercion or promises of any immunity, do swear and affirm that the statement I am about to make is a true statement."

The jurat to the statement is further proof of appellant's claims:

> "Sworn and subscribed before me this 24th day of November, 1943. Howard Ark, First Lieutenant, A.C., Summary Court Officer".

Civilian personnel of army camps are subject to Court Martial under Article II of Articles of War.

6 *C. J. S.,* Sec. 54 (C), p. 448.

Civilians on duty with armies in the field in time of war, include civilians serving in cantonments or training camps within or without the United States.

Hines v. Mikell, 259 Fed. 28, 170 C. C. A. 28.

That the whole proceeding under which this purported confession was obtained was one calculated by the army officers in charge, to impress appellant with the idea that he was actually being court martialled. The officers knew that they were endeavoring to trick and did trick the appellant.

The specifications of charges must be served on the accused within eight days after his arrest.

U. S. v. Smith, 197 U. S. 386, 49 L. Ed. 801, 25 Sup. Ct. 489.

The defendant must be informed of the charge against him in language sufficiently clear to inform the accused of the offense for which he is tried and to enable him to prepare his defense.

In re Stubbs (C. C. Wash.), 133 Fed. 1012.

The record must show the oath as having been administered to each member of the Court before commencement of the trial.

3 Op. Atty. Gen. 397, 544.

There are no presumptions in favor of regularity of courts martial.

Runkle v. U. S., 122 U. S. 543, 30 Law. Ed. 1167, 7 Sup. Ct. 1141.

There is no trial at court martial until the reviewing and confirming authority has taken final action on the case.

10 *U. S. C. A.,* Secs. 1517-1519;

In re Bogart (C. C. Cal.), 3 Fed. Cas. No. 1596, 2 Sawy. 396.

If any one of the statutory requirements is not followed by the court martial, the whole proceeding is void.

McClaughry v. Deming, 186 U. S. 49, 46 Law. Ed. 1049, 22 Sup. Ct. 786.

ASSIGNMENT OF ERROR No. 10.

The Court erred in admitting U. S. Exhibit No. 11 (T. 58).

This is another "confession" obtained by an F. B. I. agent from the appellant on November 29, 1943, five days after the pseudo court martial.

This statement was admitted over the objections of Counsel for appellant on the grounds:

1. That it was and is incompetent to prove any of the issues of this case.

2. That it was and is hearsay.

3. That it is in form an extrajudicial statement for which no foundation had been laid.

4. That it was highly prejudicial to defendant.

As we have shown under Assignment of Error No. 9 the appellant was first subjected to a so-called court

martial on November 24. On November 29, U. S. Exhibit No. 11 was elicited from the appellant by an F. B. I. agent.

Appellant was not under arrest at any time although he was advised and informed that he was. He had no way of determining whether he was still subject to the court martial proceedings when he was "invited" to go to the F. B. I. office. He had been under very close surveillance November 23rd, 24th and 25th and so far as we can glean from the record had been closely questioned between the 25th and 29th. At least the F. B. I. agent had to approach appellant some time between those days in order to extend the "invitation" for the visit.

The officers of the Federal Bureau of Investigation are authorized to make arrests and the Statute requires that "The person arrested shall be immediately taken before a committing officer".

5 *U. S. C. A.,* 300a.

The laws of the State of California provide that when an arrest is made without a warrant by a peace officer or private person, the person must without unnecessary delay be taken before a magistrate.

California Penal Code, Section 849.

If the arrest is made, he must be taken before the magistrate within two days.

California Penal Code, Section 825.

A confession obtained under duress by an F. B. I. agent without an arrest of the accused is sufficient

ground of and in itself for reversal of the judgment and verdict.

McNabb v. United States, 318 U. S. 332, 342, 63 Sup. Ct. 608, 613;

Anderson v. United States, 318 U. S. 350, 355, 63 Sup. Ct. 599, 601.

A confession obtained under similar circumstances after five days of interrogations and admitted in evidence has been sufficient cause for reversal.

Chambers v. State of Florida, 309 U. S. 227, 239, 60 Sup. Ct. 472, 478.

This is not a new rule. It has long been the protecting arm established by the Constitution.

Naftzger v. United States, 118 C. C. A. 598, 200 Fed. 494, 498.

Where confessions appear to have been made to persons in authority, the burden is upon the prosecution to prove that they were voluntary.

1 *Wharton Crim. Ev.,* Sec. 206, p. 226;

Johnstone v. United States, 1 Fed. (2d) 928.

ASSIGNMENT OF ERROR No. 11.

The Court erred in admitting U. S. Exhibit No. 12 (T. 62), a box of tools. Objections to its admission were timely made on the grounds:

1. There was no identification of any of the tools as having ever been at McClellan Field or had ever been owned by or in possession of the United States and no evidence independent of the extrajudicial con-

fessions of defendant connecting the appellant with any of the tools in such exhibit.

2. They were admitted solely on the ground they were similar to tools at McClellan Field and therefore the Court indulged in a presumption of guilt as the basis.

The testimony showed they were found in possession of appellant. However, mere possession of stolen goods unaccompanied by other evidence of guilt is not to be regarded as *prima facie* evidence, even of burglary.

1 *Wharton Crim. Ev.,* Sec. 191, p. 201.

> "The possession of the stolen goods must be personal, recent and unexplained and must involve a distinct and conscious assertion of property by the defendant".
>
> 1 *Wharton Crim. Ev.,* Sec. 191, p. 199.

The charge set up in the indictment is that appellant stole the tools on or about January 1, 1942, and since he was found Not Guilty of possession of the tools and all counts of the indictment relating to possession were dismissed, then the evidence here presented must be viewed in the light of the single count of the indictment, to-wit: that he did on or about January 1, 1942, take and carry away personal property of the United States with intent to steal and purloin the same.

Obviously to support such a charge, there ought to be at least some identification of the article or articles as being the personal property of the United States.

The taking, in order to support a charge of larceny, must be against the will of the owner or at least without his consent. In other words, the act of taking must be a trespass against the owner's possession.

18 *Am. & Eng. Ency. of Law,* 2d, p. 469.

Further, the thing taken and carried away must be the property of another.

18 *Am. & Eng. Ency. of Law,* 2d, p. 498.

ASSIGNMENT OF ERROR No. 12.

The Court erred in sustaining objections on the grounds of incompetency, immateriality and irrelevancy to the testimony of the appellant in attempting to show the method and means provided by the Field to return tools upon transfer to another position on the Field (T. 73).

Appellant had testified up to the point where he partially showed the regulations of the Army under which he was required to work, but he was prohibited from showing the entire setup as to how tools could come into his possession and the means and methods provided at the Field for getting them out of his possession. The regulations of the Army are as much the law as any statute of Congress, particularly as concerns civilian employees on that field.

The rules and regulations of governmental agencies "become a mass of that body of public records of which the Courts take judicial notice".

Caha v. United States, 152 U.S. 211, 38 Law. Ed. 415, 14 Sup. Ct. 513, 517.

Therefore, in this case the Court erred in failing and neglecting to take judicial notice of those regulations in force at the Field and under which all civilian employees must serve and which regulations provide the only means at the Field whereby an employee can obtain tools with which to work or can obtain tools to take from the Field.

ASSIGNMENT OF ERROR No. 13.

The Court erred in sustaining objection to introduction in evidence of demand of McClellan Field against appellant in the sum of $61.24 to cover value of lost tools, which demand appellant received through the mails (T. 77).

This evidence was competent to further show the system established by the Army under which employees were issued tools and if they were not returned, the value of tools were charged against the employee and he had to pay for them. Such evidence would further show that there was no intent on the part of appellant to steal any tools and also to show that any tools he had which might be identified as property of the United States had come into his possession lawfully under the rules and regulations of the Field.

Counsel for appellant offered to show the Court that this was the system established and maintained at the Field, but was not allowed to introduce any evidence on the point.

Apparently the indictment itself was taken as sufficient evidence of the guilt of appellant and no further testimony or evidence was required. The course of the trial established the fact that the Court quite evidently took the two statements of the appellant, the one before the court martial and the other before the F.B.I. Agent, as absolute demonstrative evidence of the guilt of the appellant and that any statement or assertion or any other evidence offered or submitted by appellant tending to rebut either of those statements was not considered and was refused by the trial Court.

We have always understood that in any crime such as this, it must be proven that the accused acted with a felonious intent. That is, the taking and the carrying away must be with the intent, without claim or pretense of right or justification, to deprive the owner of his property wholly and permanently.

18 *Am. & Eng. Ency. of Law,* 2d, p. 500.

Evidently the Army knew for a long time that this appellant had tools of the United States in his possession (T. 82). The records were carried in the Field and the matter of taking or of possession was considered a mere bookkeeping routine, else the authorities of the Field would not have billed the appellant for lost tools in the sum of $61.24 (T. 78), nor have given him a receipt for $52.92 (T. 81) for tools paid for by withholding that sum from his salary.

ASSIGNMENT OF ERROR No. 14.

The Court erred in sustaining objections to introduction in evidence of 12 memorandum receipts issued by McClellan Field to appellant and listing tools contained in the indictment (T. 78-81).

The reasons why such memorandums should have been admitted are:

1. They showed that all tools named in the indictment, other than those classified as expendable and non-recoverable and other than those owned by appellant, were regularly issued to appellant under the system used at McClellan Field, for which he was charged and which he had paid for.

2. They were competent evidence to prove appellant was not guilty of stealing any of the tools.

3. They were material to his defense.

4. They were relevant to the issue of guilt or innocence of appellant.

What we have said under Assignments of Error Nos. 12 and 13 above applies equally here and repetition is unnecessary.

ASSIGNMENT OF ERROR No. 15.

The Court erred in sustaining objection to admission of Receipt No. E-N-3753, Voucher 1-12-44 issued by McClellan Field to appellant either in December, 1943, or January, 1944, showing payment of $52.92 for tools (T. 81).

The reasons why the voucher should have been admitted are:

1. That it was part of the system in use at the Field.

2. That it was competent to show the innocence of appellant of either intent to steal or felonious possession of tools.

3. That it was relevant to the issue of guilt or innocence.

4. That it was material to the defense of both theft and possession.

ASSIGNMENT OF ERROR No. 16.

The Court erred in sustaining objection to testimony of appellant as to conversation had with Captain Pearce the day following the date of the alleged "confession" set forth under Assignment of Error No. 9, above (T. 54).

The reasons this testimony and evidence should have been admitted are:

1. It showed the extent of the grilling appellant received in the effort to obtain the so-called confession.

2. It is established the fact that this appellant believed and was warranted in his belief that he was on November 25, 1943, still under court martial since its convening on the day previous.

3. It showed the so-called confession was obtained pursuant to third-degree methods.

4. It was competent to show the whole course of the investigation to which this appellant was subjected.

5. It was relevant and material to show the whole of this third-degree proceeding which appellee had opened up in its case in chief.

We have treated this "confession" and the grilling appellant received before, during and after its date under Assignments of Error Nos. 9 and 10, and we need not add to those arguments.

ASSIGNMENT OF ERROR No. 17.

The Court erred in striking out the testimony of appellant regarding being in custody of Mr. Chandler (T. 86).

This is part of the showing of appellant in support of his showing none of these alleged "confessions" bore the least semblance to being voluntary. We have argued the points under Assignments of Error Nos. 9 and 10.

ASSIGNMENT OF ERROR No. 18.

The Court erred in sustaining objection to introduction in evidence of appellant's Exhibit "K" for identification: Pass for tools (T. 94).

The reasons why this evidence should have been admitted are:

1. It was competent to show the system in use at the Field under which employees were permitted to take tools from the Field.

2. It was relevant to the defense of appellant as showing tools could be off the Field and yet lawfully in possession of that individual.

3. It was material to the defense of appellant as showing that persons other than appellant were permitted to take tools from the Field to the homes.

In appellee's Exhibit No. 10 (T. 55) it will be noted that reference is made to articles given appellant on a pass to be taken from McClellan Field.

Since appellee had opened the question in its case in chief, appellant should have been accorded an opportunity to show how tools were given workmen on pass and taken from the Field with no time or date set for their return.

This evidence was essential in defense to show utter absence of any felonious intent in taking tools from the Field.

ASSIGNMENT OF ERROR No. 19.

The Court erred in sustaining objection to testimony of witness Dudley regarding expendable tools, on the sole ground that appellant had already testified on the same point (T. 95).

We were certainly entitled to show, by independent proof, that employees other than appellant were allowed to take government property away from the

Field; that such practice was well established; that it was routine, and that such person could hardly be held guilty of stealing.

Obviously, the Court presumed the appellant guilty as charged in the indictment.

The rejected testimony was proof of absence of felonious intent. True, it should not devolve upon a defendant to make such proof, but here it was. This appellant was tried under the theory that the indictment was proof of guilt and it was up to him to prove his innocence.

That being the case, appellant was entitled to present all evidence germane to his claim of not guilty and it was highly prejudicial error to deny him that privilege.

ASSIGNMENTS OF ERROR Nos. 20, 21 AND 22.

We have grouped these assignments as they all refer to the same elements, namely: the grant of the right of employees to take tools from the Field to their homes.

We have covered our objections under Assignment of Error No. 19, and need not repeat them here.

ASSIGNMENTS OF ERROR Nos. 23 AND 24.

The Court erred in sustaining objection of counsel for appellee on grounds it was incompetent, irrelevant and immaterial and no bearing on the guilt or inno-

cence of appellant to question asked of witness Dudley as follows (T. 97):

"Q. Do you know whether tools and equipment on the Field of usable character were thrown into the junk pile or into the fire pit where anyone could take them if they wanted them?"

The Court erred in sustaining objection of counsel for appellee on grounds it was incompetent, irrelevant and immaterial, no bearing on the guilt or innocence of defendant to question asked of witness Dudley as follows (T. 97):

"Q. Do you know of your own knowledge whether an employee prior to August, 1943, could obtain a pass from the authorities to take any of that material or tools from the junk pile or fire pit and take it off the Field".

Where the Army discards material, it is common knowledge that it is either sold or junked. Appellant should have been accorded the right of proving this system was established and carried on at McClellan Field.

If the Army was violating some law, appellee should be prosecuting it. It may have been that this evidence was closely approaching that proof and for that reason must be kept from the record.

Why this appellant should be adjudged guilty of theft because he had lawfully in his possession certain articles claimed to have been stolen is stretching legal logic to a remarkable degree.

ASSIGNMENT OF ERROR No. 25.

The Court erred in rejecting the offer of proof of appellant to show that a foreman issuing tools to workmen would find himself with two of the same kind, as one workman would turn in the bit of a drill and another the shank and be reissued two drills. When the workmen quit or were transferred, the foreman would have two drills, was charged with one only, and he could never return the other (T. 98).

The proof should have been received because:

1. It was competent to show that tools from the Field found in the possession of any person off the Field, are not evidence either of theft or of unlawful possession.

2. It was relevant and material to the defense as showing absence of any criminal intent when tools were found in possession of this appellant.

Mere possession of the articles without evidence of felonious taking by appellant or some other person is no evidence of theft.

1 *Wharton Crim. Ev.,* Sec. 191, p. 201;
People v. Beaver, 49 Cal. 57, 58.

ASSIGNMENT OF ERROR No. 26.

The Court erred in finding appellant guilty of the first count of the indictment, that of theft, while finding him not guilty of possession on the remaining five counts.

1. The only evidence that could possibly connect the appellant with any crime was the fact he had tools in his possession.

2. To omit all evidence of possession from the case would leave nothing whereon to base a charge of theft.

3. To convict of theft alone necessitates indulging in a presumption of guilt, a presumption of intent, a presumption against reasonable doubt, resulting in a conviction founded solely upon presumptions based upon presumptions.

If a presumption of innocence follows a defendant throughout the trial and if all doubts and uncertainties are to be resolved in his favor, then this appellant is entitled to have considered the utter absence of evidence of theft and of intent to steal viewed in the light of the determination by the trial Court that appellant was not guilty of having the same articles in his possession.

This presumption of innocence "is not a will-o'-the-wisp, which appears and disappears as the trial progresses. The presumption does accompany the accused through every stage of the trial. And it is a presumption of law to be considered by the jury. Although not strictly evidence, it is in the nature of evidence in favor of the accused."

Dodson v. United States, 23 Fed. (2d) 401 (followed in *Turner v. United States,* 25 Fed. (2d) 1023).

ASSIGNMENT OF ERROR No. 27.

The Court erred in refusing appellant a new trial on the grounds set forth in the written motion filed (T. 101).

Our preceding assignments of error have sufficiently covered this point.

CONCLUSION.

We submit that every inference or presumption of innocence of appellant was eliminated at the trial of this cause.

The question of reasonable doubt was never considered at any stage of the proceedings.

Obviously, the indictment was considered as evidence of appellant's guilt and any evidence that might tend to disprove it was barred by the trial Court.

The trial Court believed that the possession by appellant of the articles described in the indictment was sufficient to convict appellant of the first count thereof, as that is the only evidence of theft appellee could establish. No witness ever saw any of those articles at McClellan Field and no witness testified he, personally, knew any of those articles were missing from the Field. No person saw appellant take any of them from the Field, and no witness was produced who ever heard the appellant say he stole them or that he took them away with intent to keep them or convert them to his own use.

On its face the whole proceeding was far from attaining the dignity of a prosecution for a real crime.

The appellant had been employed by the Air Corps of the Army since March 1, 1929. At the time of his discharge he was Assistant Superintendent, Air Craft Shops (T. 63). As such he supervised the work of eighteen general foreman, thirty-seven assistant general foreman, and approximately fifty-five hundred Air Craft Shops employees (T. 72).

A thief could hardly have risen from a welder to such a responsible position. There is not a mark against his name on the rolls of the Air Corps.

Appellant was charged with and convicted of a crime of plain theft of a lot of battered, rusty tools, not one of which any mechanic would use in his daily work, and no foreman would permit use of at any time, yet appellant was found not guilty of having them in his possession. If they had been stolen, would he not likewise be guilty of having stolen goods in his possession? And if they were not stolen goods and appellant was not guilty of having them, then it must follow as a natural corollary that he was lawfully in possession. There is no middle ground here. Either appellant was lawfully entitled to the possession of the articles or he was not. Therefore, he could not be guilty of theft of something found to be lawfully in his possession.

There may be some error in our legal reasoning here, but careful analysis of the problem fails to indicate it.

We cannot follow reasoning that resolves that one can be guilty of stealing that which he is lawfully possessed of.

We believe our appeal is well founded in fact and that ample grounds exist for reversal.

We therefore pray that the judgment of conviction be set aside and reversed and that appellant be discharged from custody.

Dated, Sacramento, California,
May 10, 1944.

Respectfully submitted,
CHAS. L. GILMORE,
Attorney for Appellant.